STATE OF MICHIGAN

IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals and the Circuit Court for the County of Genesee)

DAYLE TRENTADUE, as Personal Representative of the Estate of MARGARETTE F. EBY, Deceased,

Plaintiff-Appellee,

-vs-

SC: 128623, 128624, 128625
COA: 252155, 252207, 252209
Genesee CC: 02-074145-NZ

BUCKLER AUTOMATIC LAWN SPRINKLER COMPANY, SHIRLEY GORTON, LAURENCE W. GORTON, JEFFREY GORTON, VICTOR NYBERG, TODD MICHAEL BAKOS and CARL L. BEKOFSKE, as Personal Representative of the Estate of RUTH R. MOTT, Deceased,

Defendants,

and

MFO MANAGEMENT COMPANY,

Defendant-Appellant.

_____/

AMICUS CURIAE BRIEF ON BEHALF OF IRON WORKERS LOCAL NO. 25 PENSION FUND, ET AL.

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases:

Statutes:

Rules:

Other Authorities:

STATEMENT OF ORDER APPEALED FROM

On July 19, 2006, the Michigan Supreme Court granted leave to appeal in this action and directed the parties to brief the issues of: "whether the Court of Appeals' application of a common law discovery rule to determine when plaintiff's claims accrued is inconsistent with or contravenes MCL 600.5827, and whether previous decisions of this Court, which have recognized and applied such a rule when MCL 600.5827 would otherwise control, should be overruled."

Amicus Curiae Iron Workers Local No. 25 Pension Fund, et al., (cumulatively "Ironworkers") take no position as to whether the unique facts of this action properly compelled the Michigan Court of Appeals to apply the "discovery Rule." Rather, this Brief will address only the contention that previous decisions of the Michigan Supreme Court have properly recognized and applied the common law discovery rule in situations when MCL 600.5827 would otherwise control. Moreover, the Ironworkers further contend that abrogation of the discovery rule would violate principles of statutory construction, the doctrine of *stare decisis,* and due process of law.

STATEMENT OF ISSUE PRESENTED

SHOULD THE COMMON LAW DISCOVERY RULE, AS FORMULATED BY PREVIOUS DECISIONS OF THE MICHIGAN SUPREME COURT, CONTINUE TO REMAIN AS AN ESSENTIAL ELEMENT OF THE JURISPRUDENCE OF THIS STATE EVEN WHEN MCL 600.5827 WOULD OTHERWISE CONTROL?

Plaintiff-Appellee says "Yes."

Defendant-Appellant says "No."

Amicus Curiae Iron Workers Local No. 25 Pension Fund says "Yes."

Neither the trial court nor the Court of Appeals addressed this issue.

STATEMENT OF INTEREST OF AMICI CURIAE

The Multiemployer Defined Benefit Pension Plans

The Iron Workers Local No. 25 Pension Fund is an ERISA governed multiemployer defined benefit pension plan, which covers over 5,000 participants and receives contributions from over 550 Michigan employers. The Fund is administered by a Board of Trustees consisting of six members who manage the Fund. Three Trustees are chosen by the organization that represents the contributing employers in Michigan, and three Trustees are chosen by the local union representing the employees, the Ironworkers Local Union No. 25.

Other similar Multiemployer Plans represented in this Brief are the Roofers Local 149 Pension Fund (representing approximately 2,900 participants); Plumbers Local 98 Defined Benefit Pension Fund (approximately 3,100 participants); Pipefitters Local 636 Defined Benefit Pension Fund (3,100 participants); and I.A.M. Motor City Pension Funds (450 participants)

Michigan State Building and Construction Trades Council

Many Plan participants are also represented by The Michigan State Building and Construction Trades Council, a nonprofit corporation representing approximately 90,000 organized construction trade employees across the State of Michigan.

MERS

The Municipal Employees' Retirement System of Michigan (MERS) is a state statutory retirement plan and tax-qualified trust that municipalities may adopt for their employees. Created by 1945 PA 135, repealed and replaced by 1984 PA 427, the Municipal Employees Retirement Act of 1984, MCL 38.1501, et seq., MERS operated

under state government from 1945 until 1996. By virtue of amendatory 1996 PA 220, MERS became an independent non-profit statutory public corporation, an instrumentality of its constituent municipalities. Under the continuing authority of 1984 PA 427, MERS provides pooled pension, health, and ancillary benefit programs to more than 70,000 members in over 680 units of local government.

MAPERS

The Michigan Association of Public Employee Retirement Systems, MAPERS, was established to provide educational training and legislative updates to trustees of Public Employee Retirement Systems within the State of Michigan.

Applicable Federal and Michigan law mandates that fiduciaries of governmental pension retirement plans in the State of Michigan meet required fiduciary obligations. In the State of Michigan most municipal, state, and county retirement plans are administered by a Board of Trustees. The Board of Trustees typically consists of elected government officials appointed by the governing political body and elected from member employee groups.

Public retirement systems are typically separate trust funds established for the sole purpose of providing retirement benefits to retirees and beneficiaries and providing disability benefits to employees disabled in the course of employment.

Members of public pension plans range from clerks at city hall to judges and legislators, police officers to road repair crews from the state highway department, fire fighters and teachers. Any person who is employed in the public sector on a full-time basis is a potential member of a public pension plan.

Significance of Discovery Rule to these Entities

Various consultants are retained to provide professional advice and services to private and public pension funds, including an investment consultant, attorney, accountant/auditor, and actuary.

Private pension plans subject to ERISA are required to retain an actuary to prepare and file with the Department of Labor an annual actuarial statement detailing the plan's financial condition and to furnish this statement to the plan's participants, 29 U.S.C. § 1023(a)(4)(A). This actuarial statement must be prepared by an "enrolled actuary" defined in ERISA as an individual who, in addition to having either attained a Bachelor's or higher degree in actuarial mathematics from an accredited university and having successfully completed an examination in basic actuarial mathematics methodology, successfully completes an actuarial examination in actuarial mathematics specifically relating to pension plans administered by either the Joint Board for Enrollment of Actuaries or another organization which the Joint Board has determined to be its equivalent, 20 C.F.R. § 901.13.

Similarly, Michigan Public Act 314 requires public pension plans to retain an actuary to perform an actuarial valuation on either an annual or bi-annual basis, depending on the plan size.

The services that actuaries provide to pension funds are the most complex of all of the services provided by the various consultants. Given the complexity and nature of the services performed by plan actuaries, the plan trustees usually cannot discover the negligence until several years after the subject acts/omissions. Without the application of the discovery rule, such highly trained and compensated service

providers in this particularly arcane and complex field may be allowed to escape any and all liability for their own negligence. Recognizing the specialized expertise of actuaries in evaluating the financial standing of a plan and publishing its valuation to the plan's participants, the United States Court of Appeals for the Second Circuit has described actuaries as "one of the primary guardians of reliable, objective data." Gerosa v Savasta & Co., 329 F. 3d 317, 329 (2d Cir 2003). See also Gallagher Corp. v Massachusetts Mutual Life Insurance Company, 105 F. Supp. 2d 889 (ND Ill. 2000), where applying the discovery rule, the Court noted:

> Plaintiffs, as non-actuaries, were not in a position to understand the potentially injurious ramifications of using certain actuarial assumptions and methods. Indeed, both parties have turned to experts in order to assess the soundness of the actuarial work performed by [the defendant] in this case. **Plaintiffs could not have foretold the impact of the actuarial devices used by Mass Mutual when the parties now require expert testimony in order to assess the soundness of the actuarial work.** Moreover, plaintiffs relied on Mass Mutual to advise them regarding the appropriateness of the actuarial assumptions and methods applied to the plan. Plaintiffs claim that, in dereliction of this trust, Mass Mutual continually informed them that nothing was wrong with the plan's financial well-being. Plaintiffs first learned that the actuarial work may have been deficient in August 1993, when [one of the plaintiff trustees] discovered that the plan was in a deficit position and could not be terminated. [emphasis added].

In view of the complexity of the subject and the necessary degree of reliance on the actuary, elimination of the discovery rule would virtually deprive pension plan trustees of their legal recourse against plan actuaries for negligence and negligent misrepresentation.

Significantly, the Iron Workers and the Pipefitters are currently engaged in litigation in federal district court in the Eastern District of Michigan against their former actuarial service providers. The Trustees of both Plans retained actuarial firms to

provide services for their defined benefit plans pursuant to the mandates of ERISA § 103; 29 U.S.C. § 1023(a)(4)(A) et. seq. It is alleged that the consulting actuaries provided negligent ongoing professional actuarial advice, analyses, and recommendations concerning the structuring costs to fund benefits and to value the Funds' financial status. Elimination of the discovery rule for claims of negligence will deprive Plan Trustees and their contributing employers of their rightful claims against these sophisticated experts upon whom they rely. **Ultimately, it is the tens of thousands of Michigan citizens, in both the private and public sector, who rely on these actuaries for sound, honest, prudent advice for their retirement security, who will unjustly suffer.**

The appeal in the Trentadue matter involves issues significant to the jurisprudence of the state and to the Iron Workers as well as all of the private and public pension funds in this state. Specifically, the elimination of the discovery rule would virtually negate the possibility of holding actuaries accountable for their negligence and would leave thousands of Michigan employers and employees without recourse. Such a ruling would serve to encourage actuaries to hide their negligence and simply wait for the passage of time, awarding them for their malfeasance.

ARGUMENT

THE COMMON LAW "DISCOVERY RULE," AS FORMULATED BY PRIOR DECISIONS OF THE MICHIGAN SUPREME COURT, SHOULD REMAIN AS A VALID AND NECESSARY ELEMENT OF THE JURISPRUDENCE OF THE STATE EVEN WHERE MCL 600.5827 WOULD OTHERWISE CONTROL.

A. Standard of Review

Amicus Curiae agree that the issues of which the Michigan Supreme Court granted leave to appeal are issues of statutory interpretation that are to be reviewed by the Michigan Supreme Court *de novo*.

B. Background to the Common Law Discovery Rule and MCL 600.5827

The statute of limitations for general negligence claims is three years. Specifically, MCL 600.5805 states in pertinent part:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff... the action is commenced within the periods of time prescribed by this section.
>
> * * *
>
> (10) The period of limitations is three years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.
>
> MCL 600.5805(1)(10).

§ 5805(1) thus dictates that the date of accrual is generally to be considered as the triggering date upon which the applicable limitations period is to begin to run. MCL 600.5827 defines when a claim accrues and states that "the claim accrues at the time

the wrong upon which the claim is based was done regardless of the time when damage results."

When the tortious conduct and injury are contemporaneous or in proximity, §5827 applies without problems. However, the appropriate application of this statute is called into question when there is a lengthy period between the tortious conduct and the resultant damage; or when there is a delay between the damage and the Plaintiff's discovery of a causal connection between the Defendant's conduct and the damage. In this regard, the Michigan Supreme Court has held that the term "wrong" as utilized in § 5827 refers to "the date on which the Defendant's breach harmed the Plaintiff, as opposed to the date on which the Defendant breached his duty." Moll v Abbott Laboratories, 444 Mich 1, 12; 506 NW2d 816 (1993). As the Supreme Court more recently stated, "the wrong is done when the Plaintiff is harmed rather than when the Defendant acted." Boyle v General Motors Corp, 468 Mich 226, 231; fn 5; 661 NW2d 557 (2003).

This interpretation of § 5827 avoids the absurd result arising when the statute of limitations would otherwise expire before the Plaintiff knows or should know that he is injured. Moll, supra, 444 Mich at 12. Thus, a cause of action for tortious injury accrues when all elements of the claim have occurred and can be alleged in a proper complaint, Stephens v Dixon, 449 Mich 531, 539; 536 NW2d 755 (1995), because it is at this subsequent time (e.g., when the plaintiff knows or should know that he or she is harmed) that the wrong is "actionable" and all the elements of the action, including injury are present. Connelly v Paul Ruddy's Equipment Repair, 388 Mich 146, 150-151; 200 NW2d 70 (1972).

Consistently, the Supreme Court has adopted the "discovery rule" to avoid the premature barring of a cause of action. Moll, supra, 444 Mich at 12. Applying the discovery rule, a Plaintiff's claim accrues under § 5827 when the Plaintiff discovers, or through the exercise of reasonable diligence should have discovered, the injury and the causal connection between the injury and the Defendant's breach. Id, at 16. The discovery rule applies to the discovery of a specific injury, rather than to the discovery of the identities of all possible parties. Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim. Solowy v Oakwood Hospital Corp, 545 Mich 214, 223; 561 NW2d 843 (1997).

The Supreme Court has explained that the statute of limitations is a procedural device designed to promote judicial economy and protect Defendants' rights, supra. However, the Supreme Court applies the discovery rule to prevent unjust results "when a plaintiff would otherwise be denied a reasonable opportunity to bring suit due to the latent nature of the injury or the inability to discover the causal connection between the injury and the defendant's" tortious conduct. Lemmerman v Fealk, 449 Mich 56, 65-66; 534 NW2d 695 (1995). An objective standard is utilized to determine when a plaintiff either discovers or, through the exercise of reasonable diligence, should have discovered a possible cause of action. Moll, supra, at 16. As the Moll Court further explained:

> We find that the best balance is struck in the use of the "possible cause of action" standard. This standard advances the Court's concern regarding preservation of a plaintiff's claim when the plaintiff is unaware of an injury or its cause, yet the standard also promotes the Legislature's concern for finality and encouraging a plaintiff to diligently

> pursue a cause of action. Once a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action.
>
> Id at 23-24.

In Chase v Sabin, 445 Mich 190, 196-197; 516 NW2d 60 (1994), the Michigan Supreme Court similarly reasoned:

> Similarly, because statutes of limitation do not evidence a legislative intent to extinguish a cause of action before the Plaintiff is aware of the possible cause of action, we have adopted the discovery rule in the appropriate instances... 'If the three year period of limitation began to run at the time of the defendant's breach, most, if not all claims would be barred before the plaintiff had reason to know of the injury and the cause of the injury. Such an interpretation seeks 'to declare the bread stale before it is baked'. (Citation omitted.)
>
> 445 Mich at 196-197.

The Michigan Supreme Court initially described the discovery rule in a manner that implies that it was derived from that Court's interpretation of MCL 600.5827. Connelly v Paul Ruddy's Equipment Repair, 388 Mich 146; 200 NW2d 70 (1970). However, the Supreme Court has subsequently applied the rule in a number of different factual contexts by describing it as a common law or equitable rule. See, e.g., Johnson v Caldwell, 371 Mich 368; 123 NW2d 785 (1963) (rule applied in medical malpractice cases before subsequent statutory codification), Williams v Polgar, 391 Mich 6; 215 NW2d 149 (1974) (rule applied in negligent misrepresentation cases), Larson v Johns-Manville Sales Corp, 427 Mich 301, 309; 399 NW2d 1 (1986), (rule applied in products liability cases for asbestos-related injuries), Moll, supra, 444 Mich at 12-13 (rule applied in pharmaceutical products liability cases). The Supreme Court in Stephens emphasized that, in such cases, the concern for protecting Defendants from 'time flawed evidence, fading memories, lost documents, etc.,' is less significant,

and not compromised by application of the doctrine. Stephens, supra, at 537, quoting Larson, supra, at 312.

C. MCL 600.5827 Does Not Apply to Bar Application of the Discovery Rule When the Claim is Subject to the Three Year Statute of Limitations set forth in MCL 600.5805(10).

In its Order of July 19, 2006, which granted leave to appeal, this Court requested the parties to brief whether the common law discovery rule should be eliminated as inconsistent with MCL 600.5827. In *sua sponte* framing this issue,[1] the Supreme Court erroneously presumed that MCL 600.5827 applies to a claim subject to the three statute of limitations set forth in MCL 600.5805(10). The unambiguous language of § 5827 demonstrates that it does not.

MCL 600.5827 provides:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim **accrues**. The claim **accrues**, at the time provided in Sections 5829 to 5838 [MCL 600.5829 to 600.5838], and in cases not covered by these sections the claim **accrues** at the time the wrong upon which the claim is based was done regardless of the time when damage results.
>
> MCL 600.5827.

Thus, MCL 600.5827 provides that a period of limitations runs from the date a claim accrues "except as otherwise expressly provided." Where the legislature does not otherwise expressly provide, a claim accrues under § 5827 "at the time the wrong upon which the claim is based was done...." Id.

[1] The parties to this appeal did not address the issue of whether the discovery rule should be entirely eliminated in their initial Application for Leave to Appeal and Response brief. Defendants argued for elimination of the doctrine only in response to this Court's July 19, 2006, Order.

One statute the legislature "expressly provided" for, exclusive of § 5827, is MCL 600.5805(10), which was quoted in full on page 1 of this brief. Notably, § 5805(10) is drafted in a different manner from the other subsections of that statute which designate specific periods of years following accrual in which particular classes of claims must be filed. For example, as was emphasized in the principal Plaintiff-Appellee's Brief, § 5805(2) and (5) specify that after a claim for assault, false imprisonment or malicious prosecution first accrues, "the period of limitations is two years." Otherwise stated, most of the subsections of § 5805 designate the type of personal injury claim and the number of years after "accrual" during which a complaint alleging that claim must be filed.

Contrast that, however, with § 5805(10), which does not designate the date of "accrual" of a claim such as negligence as the beginning of the time period from which the limitations is to be measured. Instead, § 5805(10) states that, with respect to such claims, a three year limitations period is to be measured from "after the time of the death or injury." MCL 600.5805(10). [2]

Under these circumstances, MCL 600.5827 and 600.5805(10), which both relate to the commencement of the applicable limitations period, must be construed and applied together (in "*pari materia*") to ascertain the legislature's intent and to reconcile any potential inconsistencies. World Book Inc. v Dept of Treasury, 459 Mich 403; 590 NW2d 293 (1999), Glover v Parole Board, 460 Mich 511; 596 NW2d 598 (1999). Construing these two statutes together, the first clause of § 5827 specifies that the statute of limitations period commences

[2] Like § 5805(10), § 5805(14) and MCL 600.5839(1) also apply to the exclusion of § 5827 in certain actions against architects, engineers, and building contractors. Ostroth v Regency GP, LLC 474 Mich 36; 709 NW2d 589 (2006).

upon the date of accrual "except as otherwise expressly provided." § 5805(10) itself "otherwise expressly provides" that in negligence actions such as this, the three year period of limitations begins to run at "the time of the death or injury...."

In granting leave to appeal, the Supreme Court requested the parties to brief whether application of the discovery rule in this action is inconsistent with or contravenes § 5827. It thus appears that leave to appeal was granted under the mistaken assumption that § 5827 would otherwise apply to this action governed by § 5805(10). Likewise, the second issue for which further briefing was requested in the July 19, 2006 Order concerns the broader question of whether the Supreme Court should overrule all prior decisions applying the discovery rule "when MCL 600.5827 would otherwise control." Since § 5827 does not in any event apply to or "otherwise control" this action, this case does not present an appropriate vehicle for addressing the two questions contained within the July 19, 2006, Order.

D. <u>The Discovery Rule has Long been Endorsed by the Michigan Supreme Court as a Permissible, Equitable Exception to the Strict Enforcement of the Statutes of Limitation.</u>

Whether § 5805(10) applies to the exclusion of § 5827 or in coordination with that latter statute, the Michigan Supreme Court has, as an element of common law, long endorsed equitable, common law exceptions to the strict enforcement of statutes of limitations. Whether characterized as a matter of statutory interpretation (e.g. date of injury under § 5805(10) or date of wrong under § 5827 equals date of discovery of injury) or as a separate common law principle, the discovery rule remains an essential element of our jurisprudence. Moreover, as highlighted in the principal Appellee's

Brief of the Plaintiff herein, two recent Supreme Court decisions reinforce that principles of equity may still serve to bar enforcement of a statute of limitations by presiding courts under "compelling circumstances."

First, in Bryant v Oakpointe Villa Nursing Centre, Inc. 471 Mich 411; 684 NW2d 864 (2004), the Supreme Court refused on equitable grounds to endorse the dismissal of the Plaintiff's malpractice claims based upon a strict enforcement of the medical malpractice statute of limitations. Having just decided that some portions of the Plaintiff's Complaint were erroneously couched in claims of ordinary negligence in an attempt to invoke the longer limitations period applicable to negligence claims, the Bryant Court nonetheless invoked principles of equity to protect the malpractice claims against dismissal premised upon strict enforcement of the shorter malpractice limitations periods:

> The period of limitations for a medical malpractice action is ordinarily two years. MCL 600.5805(b). According to MCL 600.5852, Plaintiff had two years from the date she was issued letters of authority as personal representative of Hunt's estate to file a medical malpractice complaint. Because the letters of authority were issued to Plaintiff on January 20, 1998, the medical malpractice action had to be filed by January 20, 2000. Thus, under ordinary circumstances, Plaintiff's February 7, 2001, medical malpractice complaint (her third complaint in total) would be time-barred.
>
> **The equities of this case, however, compel a different result.** The distinction between actions sounding in medical malpractice and those sounding in ordinary negligence is one that has troubled the bench and bar in Michigan, even in the wake of our opinion in *Dorris*. Plaintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights. Accordingly, for this case and others now pending that involve similar procedural circumstances,

> we conclude that Plaintiff's medical malpractice claims may proceed to trial along with Plaintiff's ordinary negligence claim. MCR 7.316(A)(7).
>
> 471 Mich at 432 (emphasis added).

Bryant was cited with approval in Devillers v Auto Club Insurance Association, 473 Mich 562; 702 NW2d 539 (2005), involving the enforcement of the "one year back" rule applicable to first party no-fault claims filed under MCL 500.3145(1).[3] Devillers initially overruled Lewis v Daiie, 426 Mich 93; 393 NW2d 167 (1986), which had allowed § 3145(1)'s one year limitations period to be tolled from the time the insured made a specific claim for benefits to the subsequent date that the insurer formally denied the claim. Id.

However, in overruling Lewis and in responding to the dissenting opinion before it, the majority in Devillers reaffirmed that Michigan courts retain the equitable power to toll a limitations period or to *estop* a limitations defense in "unusual circumstances," including but not limited to the existence of fraud or mutual mistake. 473 Mich at 590.

The Devillers' Court further reviewed and upheld the Bryant Court's grant of equitable relief against strict enforcement of the statute of limitations as "a pinpoint application of equity based on the particular circumstances surrounding the Plaintiff's claim." Id. Devillers characterized Bryant's "limited application of equity" as "entirely consistent with the 'unusual circumstances' standard for equitable relief discussed" in Devillers itself. Id.

[3] MCL 500.3145(1) states that a no-fault claimant "may not recover benefits for any portion of the loss incurred more than one year before the date on which the action was commenced."

Significantly, Devillers cited with approval the Supreme Court's longstanding recognition of the common law doctrine of equitable *estoppel* as a similar judicial exception against strict enforcement of the statute of limitations under appropriate circumstances. Id, at Cincinnati Insurance Company v Citizens Insurance Company, 454 Mich 263, 270; 562 NW2d 648 (1997). Devillers recognized that the Supreme Court has consistently described the doctrine of equitable *estoppel* as "a doctrine of waiver that extends the applicable period for filing a law suit by precluding the Defendant from raising the statute of limitations as a bar." Id; quoting Cincinnati Insurance, supra, 454 Mich at 270. See also Lothian v Detroit, 414 Mich 160, 176; 324 NW2d 9 (1982). The Cincinnati Insurance Court had earlier explained this similar equitable doctrine as follows:

> One who seeks to invoke the doctrine generally must establish that there has been (1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of the actual facts on the part of the representing or concealing party. This Court has been reluctant to recognize an *estoppel* absent intentional or *negligent* conduct designed to induce a Plaintiff to refrain from bringing a timely action. Id. at 177.
>
> Id, at 270.

The discovery rule and equitable estoppel are two related common law doctrines which constitute "pinpoint application[s] of equity based on the particular circumstances surrounding the plaintiff's claim." Devillers, supra, at 590, fn 65. Indeed, the discovery rule in particular constitutes an equitable doctrine which is specifically "pinpointed" to the unusual circumstances of each case and will not be applied if unwarranted by the facts of that case. See, e.g., Stephens v Dixon, supra

[discovery rule not applicable to automobile negligence action], Brennan v Edward D Jones & Co, 245 Mich App 156; 626 NW2d 917 (2001) [discovery rule not applicable to commercial conversion cases].

Application of Devillers, supra, mandates a conclusion that the enforcement of the discovery rule on a case by case basis constitutes the "pinpoint" exercise of a court's equitable power which cannot be rejected on the basis that the doctrine is inconsistent with the general statute of limitations. Moreover, as in Bryant, supra, the general statutes of limitations contained in § 5805 do not constitute a "controlling statute" which negates the application of equity. Otherwise stated, an equitable doctrine such as the discovery rule may not be rejected simply because it creates an exception to the strict enforcement of § 5805 because the result would be the total elimination of equitable principles to toll the statute of limitations -- a consequence explicitly rejected by the Supreme Court in both Bryant and Devillers. Indeed, this recent authority completely subverts the primary contention of the Defendants that the determination of the existence of common law exceptions to the strict interpretation and enforcement of the statute of limitations falls exclusively within the domain of the legislature.

E. The Discovery Rule May Arise as a Result of Interpretation of Both § 5805(10) and § 5827.

For reasons discussed previously, § 5827 does not apply to this case. However, even if it did, it is possible to support application of a discovery rule through the interpretation of the text of both that statute and § 5805(10).

Specifically, § 5827's use of the time of the "wrong" and § 5805(10)'s use of the date of "injury" as the controlling time to trigger the running of the statutes of limitation

are sufficiently ambiguous such that both may be interpreted as incorporating the date of discovery of the "wrong" or the "injury." This would be a matter of statutory interpretation either in addition or as an alternative to the utilization of the discovery rule as a common law or equitable doctrine in pinpointing the time upon which the statutory limitations period begins to run.

Equally as significant, the legislature itself has recognized the inherent operation of the discovery rule in enacting and amending the various statutes of limitations. Twice since the Michigan Supreme Court has adopted the discovery rule, the Michigan legislature passed statutes which expressly limit the operation of the discovery rule. See: MCL 600.5838 and 600.5838a. (e.g. in medical malpractice and other professional malpractice actions). In both of those statutes, the legislature initially eliminated the operation of the common law discovery rule and then proceeded to provide a statutory discovery period of six months "after the Plaintiff discovers or should have discovered the existence of the claim...." See: MCL 600.5838(2); MCL 600.5838a(2).

Fundamental maxims of statutory interpretation are triggered by the legislature's actions in this regard. For example, the legislature is presumed to be aware of judicial interpretations of existing law when enacting legislation. Ford Motor Company v City of Woodhaven, 475 Mich 425; 716 NW2d 247 (2006). The legislature is deemed to act with an understanding of the common law in existence before the legislation was enacted. Nation v WDE Electric Company, 454 Mich 489; 563 NW2d 233 (1997). Statutes in derogation of common law must be strictly construed and will not be extended by implication to abrogate established rules of common law; if there is

doubt regarding the meaning of such a statute, it is to be given the effect which makes the least change in the common law. Id.

Also of import here is the doctrine of *expressio unius,* the legislature's express mention of one thing in statutes implies the exclusion of similar things. Horestman General Contracting, Inc. v Hahn, 474 Mich 66; 711 NW2d 340 (2006), Pittsfield of Charter Township v Washtenaw County 468 Mich 702; 664 NW2d 193 (2003).

Applying these maxims, the legislature was well aware of the existence of the discovery rule when it enacted and subsequently amended the various statutes of limitations on numerous occasions. When the legislature intended to modify the discovery rule by providing a shorter statutory discovery period, it did so in § 5838 and § 5838a. The legislature however chose not to modify § 5827 or § 5805(10) in a similar manner, thereby expressing an intent to retain the discovery rule as formulated by the Michigan Supreme Court when those two statutes otherwise govern.

Finally, the Michigan Supreme Court has held that "statutes should be construed so as to prevent absurd results, injustice or prejudice to the public interest." McAuley v General Motors, 457 Mich 513, 518; 578 NW2d 282 (1998), Rafferty v Markovitz, 461 Mich 265, 270; 602 NW2d 367 (1999). In fact, this year, four members of this court wrote in favor of upholding this maxim. See, e.g., Cameron v Auto Club Insurance Assoc., 476 Mich 55, 84; 718 NW2d 784 (2006), J. Markman, concurring [statutes should not be interpreted in a manner which leads to a result that is "utterly or obviously senseless, illogical, or untrue..."]

In their Appellee's Brief, Plaintiff demonstrates the absurd results which would arise if § 5827 and § 5805(5) were construed without the existence of a discovery rule.

Indeed, if Defendants' position were adopted, the Plaintiffs in a number of classes of cases would lose their right to pursue a claim before he or she even had knowledge of the existence of such an action. Amongst those cases, of course, are those in which the Plaintiff's injury does not manifest itself for a period of time. See, e.g., Moll, supra, [pharmaceutical products liability cases], Larson v Johns-Manville Sales Corp, supra, [asbestos injuries]. Also adversely affected would be professional negligence and negligent misrepresentation cases which are of particular interest to a*micus curiae* Iron Workers et al. Compare Williams v Polgar, supra.

For all these reasons, longstanding principles of statutory interpretation permit the incorporation of the discovery rule as a matter of interpretation of the statutory language of § 5805(10) and/or § 5827. The doctrine must be retained for this reason as well.

F. **Enforcement of § 5805(10) and § 5827 Without the Discovery Rule Would Violate the Due Process Clause.**

Since 1865, the Michigan Supreme Court has recognized that while the legislature has the unquestioned authority to enact statutes of limitations, that authority is limited by the due process clause. In Price v Hopkin, 13 Mich 318, 324-325 (1865), the Supreme Court stated:

> The general power of the legislature to pass statutes of limitation is not doubted. The time that these statutes shall allow for bringing suits is to be fixed by the legislative judgment, and where the legislature has fairly exercised its discretion, no court is at liberty to review its action, and to annul the law, because in their opinion the legislative authority is not so entirely unlimited that, under the name of a statute limiting the time within which a party shall resort to his legal remedy, all remedy whatsoever may be taken away .... It is of the essence of a law of limitation that it

> shall afford a reasonable time within which suit may be brought....[Price v Hopkins, supra 13 Mich 318, 324-325].

Since Price, the Michigan Supreme Court has repeatedly held that a limitations period which does not provide a reasonable time period in which to file suit is subject to challenge on due process grounds. Krone v Krone, 37 Mich 308 (1877); Dyke v Richard, 390 Mich 739, 746; 213 NW2d 185 (1973), Chase v Sabin, supra, 445 Mich 196.

In Dyke, supra, the Supreme Court specifically applied Price as prohibiting a statute of limitation from extinguishing a right to bring suit before reasonable discovery of the cause of action was possible. The Supreme Court explained:

> Since "[i]t is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought...", Price, supra, a statute which extinguishes the right to bring suit cannot be enforced as a law of limitation. As to a person who does not know, or in the exercise of reasonable diligence could not ascertain within the two year period that he has a cause of action, this statute has the effect of abolishing his right to bring suit.
>
> Such a statute, if sustainable at all could be enforced only as one intended to abolish a common law cause of action. But this statue does not purport to do this, is not asserted to do so, and we cannot ascribe any legislative intention to accomplish that end. We read it as a statute of limitation which applies in every case except where the Plaintiff does not know of his cause of action.
>
> 390 Mich at 746-747

The Michigan Supreme Court has similarly held that a limitations provision which does not afford a reasonable period of time to file suit cannot be constitutionally upheld because it prevents access to the courts. Forest v Parmalee, 402 Mich 348, 359; 262 NW2d 653 (1978) ["statutes of limitations are to upheld by courts unless it

can be demonstrated that they are so harsh and unreasonable in their consequences that they effectively divest Plaintiffs of the access to the courts intended by the grant of the substantive right"].

Simply put, abrogation of the common law discovery rule during application of § 5805(10) and § 5827 does exactly what is constitutionally prohibited: it divests Plaintiffs of access to the courts in situation in where Plaintiffs have not had a reasonable time to obtain knowledge of their cause of action because of the unique circumstances of that action.

For this reason, the common law discovery rule cannot be eliminated; to do so raises clear constitutional implications.

G. This Court Should Continue to Enforce the Discovery Rule Based upon Principles of *Stare Decisis*.

The Principal Brief of the Plaintiff-Appellee contains an exhaustive *stare decisis* analysis that demonstrates the general acceptance of the discovery rule within this jurisdiction for a significant period of time. It is not necessary that the Plaintiff's analysis be duplicated herein. Suffice it to say, application of *stare decisis* is warranted here perhaps more so than in any other issue confronted by the Michigan Supreme Court in recent years. Indeed, for the reasons articulated both in this Brief and in the Plaintiff's principal Brief, the discovery rule "has been so imbedded, so accepted, so fundamental to everyone's expectations that to change it would produce not just readjustments, but practical real world dislocations." Robinson v City of Detroit, 462 Mich 439, 466; 613 NW2d 307 (2002).

The doctrine, in fact, has become such a significant, if not essential element of the State's jurisprudence that Defendants herein did not apply for leave to appeal to

this Court on the basis that the discovery rule should be abolished. Defendants only addressed this issue because this Court raised the issue *sua sponte*. This Court should continue to adhere to the controlling nature of the exhaustive precedent that has long existed in this State.

CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, *amicus curiae* Iron Workers' Local 25 Pension Fund supports the position of the principal Plaintiff herein and requests that the Michigan Supreme Court grant the relief advocated by the Plaintiff.

Respectfully submitted,

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By: _____

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